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No. 82-167

In the Supreme Court of the United States

OCTOBER TERM, 1982

COMMANDER GEORGE C. CHAPPELL, et al.,

Petitioners,

v.

VERNON WALLACE, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE AMICUS CURIAE

LAWYERS' COMMITTEE
FOR CIVIL RIGHTS UNDER LAW
220 South State Street
Chicago, Illinois 60604

BARRY SULLIVAN
Counsel of Record

JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

Of Counsel:
JOAN M. HALL
GAIL A. NIEMANN
JEFFREY P. CHICOINE
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

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BRIEF FOR THE AMICUS CURIAE

STATEMENT OF INTEREST OF AMICUS CURIAE

The Lawyers' Committee for Civil Rights Under Law is a national organization that was organized in 1963, at the request of the President of the United States, to involve private attorneys in the national effort to assure civil rights to all Americans. The potential impact of this case on the civil rights of all minority members of the armed forces has prompted the Lawyers' Committee to file this brief *amicus curiae*, in support of the respondents and urging affirmance of the judgment below. Both petitioners and respondents have consented to the filing of this brief.

SUMMARY OF ARGUMENT

A. Respondents have a cause of action against petitioners under the fifth amendment and the Civil Rights Act, 42 U.S.C. § 1985(3). This Court's holdings in *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), and its progeny recognize a strong presumption in favor of an implied cause of action under the Constitution. The pending controversy meets all the tests set forth by this Court for the recognition of an implied right of action: no adequate alternative remedy is available to compensate respondents for their injuries, there is no explicit "congressional declaration" that a damage action is inappropriate, and no "special factors counseling hesitation" are present. *Bivens*, 403 U.S. at 396. Because this case involves an explicit statutory cause of action as well as an implied constitutional claim, this Court must in any event determine the proper scope of official immunity. In the circumstances of this case, the immunity test, like the *Bivens* analysis, must focus on whether the recognition of a damage action to redress violations of constitutional rights would unduly impair overall military effectiveness.

B. The court of appeals properly relied on *Butz* v. *Economou*, 438 U.S. 478 (1978), and the established rule of law that qualified immunity is appropriate for government officials charged with constitutional violations. The daily life of service personnel in peacetime does not qualify as an exceptional circumstance justifying absolute immunity.

This Court has previously allowed intramilitary suits for intentional torts, *Dinsman* v. *Wilkes*, 53 U.S. (12 How.) 390 (1852), and *Feres* v. *United States*, 340 U.S. 135 (1950). Indeed, the Court in *Feres* carefully distinguished the earlier intentional tort cases. Thus, this Court's prior cases demonstrate that except in the most exceptional and

limited circumstances, government and military officers are entitled only to qualified immunity in cases of constitutional violations.

C. This Court has long recognized the specialized and fundamental commitment of this nation to ferret out racial discrimination, root and branch, wherever it may be found. In the present case, this national policy can fairly be balanced against the need to preserve military effectiveness by allowing service personnel whose constitutional rights are violated to bring damage actions, while granting superior officers a qualified immunity. Petitioners have been unable to show that damage actions will impair military effectiveness. Moreover, damage actions will serve to eliminate arbitrary and racially motivated conduct within the military, and thereby increase morale and ultimately the effectiveness of the armed forces.

ARGUMENT

I.

Introduction

This case presents an important question of constitutional law, which is whether the millions of Americans who have served, are serving, and will serve in the armed forces of this nation are entitled to be made whole for violations of their constitutional rights. This Court must decide whether military officers who knowingly subject enlisted personnel to racial discrimination may be held accountable, in a meaningful way, for their unconstitutional acts.

The court of appeals held that respondents had both an implied right of action under the Constitution for violations of their fifth amendment rights and an explicit right of action under 42 U.S.C. § 1985(3). (Pet. App. 2a.)[1] The court of appeals also rejected petitioners' claimed entitlement to absolute immunity, but held that they were entitled to a qualified immunity. (Pet. App. 16a). The decision of the court of appeals is in accord with the previous decisions of this Court, and it strikes a fair balance between the important national policy of eliminating racial discrimination and the legitimate concerns of military discipline.

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[1] The opinion of the court of appeals is reprinted in the appendix to the petition for a writ of certiorari and will be referred to herein as "Pet. App." Petitioners' Brief will be referred to herein as "Pet. Br."

II.

Respondents Have An Implied Cause Of Action Under The Fifth Amendment.

The respondents' complaint alleges a cause of action against the petitioners under the fifth amendment and also under the conspiracy provisions of the Civil Rights Act, 42 U.S.C. § 1985(3). The court of appeals decided as a threshold matter that respondents had an implied *Bivens*-type action under the fifth amendment. (Pet. App. 2a.) The balance of the court's opinion analyzed the question whether petitioners were entitled to absolute immunity from suits charging constitutional violations or were entitled to a qualified immunity only. In this Court, however, petitioners apparently do not question the holding that they are not absolutely immune from suit, contending instead that a cause of action should not be implied under the fifth amendment when a member of the armed forces sues his commanding officers.

The Court should decide this case on the same basis as did the court of appeals. Although the court of appeals did decide as an initial matter that respondents had an implied cause of action under the Constitution, this Court lacks the benefit of any extensive analysis on the *Bivens* issue by either the court of appeals or the district court. Moreover, even accepting petitioners' argument that these respondents do not have a direct cause of action under the Constitution, that determination does not dispose of the issues raised by the opinion of the court of appeals. Respondents have also alleged a cause of action under 42 U.S.C. § 1985(3),[2] and unless the Court addresses

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[2] Section 1985(3) prohibits "all private conspiracies" motivated by racial animus to deprive black people of the equal protection of the laws. *Griffin* v. *Breckenridge*, 403 U.S. 88 (1971). It is not

(footnote continued)

the immunity issue as well, those claims will remain. Finally, the considerations of military discipline relied upon by petitioners are more properly considered in terms of whether an absolute or qualified immunity is appropriate.

In *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), this Court recognized an implied cause of action for damages arising directly under the Constitution for alleged violations of fourth amendment rights by federal officials. Quoting from *Marbury* v. *Madison*, 1 U.S. 267, 1 Cranch 137 (1803), this Court noted that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Bivens*, 403 U.S. at 397.

In *Davis* v. *Passman*, 442 U.S. 228 (1979), the Court extended the cause of action recognized in *Bivens* to encompass alleged violations of the equal protection component of the fifth amendment. The Court held that the plaintiff stated a cause of action for sex discrimination against her former employer, a congressman, despite the fact that Congress had specifically exempted itself from coverage under Title VII of the 1964 Civil Rights Act. *Davis*, 442 U.S. at 247; 42 U.S.C. § 2000e-16. In *Carlson* v. *Green*, 446 U.S. 14 (1980), the Court recognized an implied cause of

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(footnote continued)

limited, as is 42 U.S.C. § 1983, to acts performed "under the color of state law." *Griffin*, 403 U.S. at 101-02. Moreover, the courts have generally applied Section 1985(3) to conspiracies perpetrated by federal officials. *See, e.g., Dry Creek Lodge, Inc.* v. *United States*, 515 F.2d 926, 930-31 (10th Cir. 1975); *Peck* v. *United States*, 470 F. Supp. 1003, 1008-12 (S.D.N.Y. 1979); *Alvarez* v. *Wilson*, 431 F. Supp. 136, 141 (N.D. Ill. 1977), *appeal filed*, No. 81-2696 (7th Cir. Oct. 13, 1981) (former Navy lieutenant had cause of action under section 1985(3) against his superior officers for race discrimination).

action for damages for alleged violations of the eighth amendment, despite the fact that Congress had provided an alternative remedy under the Federal Tort Claims Act.

Like the plaintiff in *Davis*, respondents here have attempted to state a cause of action under the equal protection component of the fifth amendment. Petitioners do not dispute the existence of an implied cause of action under the fifth amendment, but instead attempt to exempt a particular group of claimants, that is, members of the military who allege that their constitutional rights have been violated by their superiors.

Petitioners argue that this Court should not recognize a cause of action directly under the fifth amendment for these individuals because the Court should not provide additional remedies in the military context absent express congressional authorization. (Pet. Br. at 13-14.) In *Bivens*, however, the Court squarely rejected the argument that it could not recognize a remedy absent express congressional authorization. 403 U.S. at 402 (Harlan, J., concurring). Indeed, *Bivens* and its progeny have held that the only situation in which the Court might not recognize an implied cause of action is when Congress has provided an adequate substitute for the damages remedy. *Bivens*, 403 U.S. at 397; *Davis*, 442 U.S. at 248. Petitioners are unable to point to any congressional provision for a substitute remedy.

Indeed, in *Carlson* v. *Green*, 446 U.S. 14 (1980), this Court held that an implied cause of action was available to the plaintiff under the eighth amendment, despite the fact that she also had a remedy under the Federal Tort Claims Act ("FTCA"). The Court analyzed the sufficiency of the FTCA remedy, finding that it did not afford the plaintiff the opportunity for punitive damages, a jury trial, or

the imposition of personal liability against the responsible official. Because the remedy provided by the FTCA was not as effective, the Court concluded, the *Bivens* remedy also was available. *Id.* at 20-23.

In most instances, enlisted personnel who suffer racial discrimination at the hands of their superiors will not have any effective remedies available within the military, nor will the nature of their injuries be subject to redress through declaratory or injunctive relief. For these people, as Justice Harlan noted in *Bivens*, "it is damages or nothing." *Bivens*, 403 U.S. at 410 (Harlan, J., concurring).

Although petitioners suggest that alternative remedies are available to these respondents within the military services (Pet. Br. at 32-35), those alleged remedies are wholly inadequate: they are narrowly drawn, they do not provide compensatory relief, they do not specifically address the problem of racial discrimination, and they rely on another party to prosecute the complaint.[3] Petitioners

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[3] Petitioners apparently suggest that respondents could obtain adequate relief before the Board for the Corrections of Naval Records under 10 U.S.C. § 1552. However, section 1552 is a very narrow provision allowing members of the armed forces to correct errors in service records and to collect back pay that may have been lost because of such errors. This provision does not authorize the board to review the *constitutionality* of activities undertaken by military officials. *Glines* v. *Wade*, 586 F.2d 675, 678 (9th Cir. 1978), *rev'd on other grounds sub nom. Brown* v. *Glines*, 444 U.S. 348 (1980).

The two other alternative mechanisms, court martial for violation of the prohibitions of 10 U.S.C. §§ 892, 893, 933, and 934 and the grievance procedure of 10 U.S.C. § 938, are also inadequate. Both require the complainant to rely on another party to prosecute the matter, and neither provides any form of compensatory relief to the victims. Moreover, the prohibitions of sections 892, 893, 933, and 934 are simply generalized statements of conduct which do not specifically prohibit racial discrimination.

are unable to point to any congressional provision for an adequate substitute remedy for these respondents, or to any congressional declaration that a damage remedy would be inappropriate. Indeed, petitioners can point to nothing but silence from Congress on this issue. *See Turpin* v. *Mailet*, 579 F.2d 152, 163 (2d Cir.) (en banc) ("[n]othing . . . suggests that legislative silence can in any way be viewed as an expression of congressional 'intent,' let alone the sort of 'explicit congressional declaration' required by *Bivens*"), *vacated and remanded mem. sub nom. City of West Haven* v. *Turpin*, 439 U.S. 974 (1978); P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart & Wechsler's The Federal Courts and the Federal System* 358 (2d ed. 1973) (courts should not lightly infer congressional efforts to preclude relief for constitutional violations).

Petitioners also argue that in the military context there are "special factors counseling hesitation" in recognizing an implied cause of action. *Bivens*, 403 U.S. at 396. (Pet. Br. at 13.) *Bivens*, however, enumerated only two such special factors, one involving questions of federal fiscal policy and the second involving situations in which the conduct complained of was not unconstitutional, but merely ultra vires. *Bivens*, 403 U.S. at 396-97.

Yet, petitioners contend that the "peculiar relationship" between a military officer and an enlisted man is a special factor that precludes the recognition of an implied cause of action. Petitioners argue that this nation's military effectiveness would be imperiled if intramilitary damage suits were allowed, presumably because such suits would impair the discipline underlying the relationship between officers and enlisted personnel. That relationship, however, is simply not the kind of special factor that

justifies ignoring the fundamental constitutional proscription against racial discrimination.

In *Davis* v. *Passman*, 442 U.S. 228 (1979), this Court examined the relationship between a congressman and his staff, both in view of the independence of the legislative branch, *id.* at 235 n.11, and the special protection provided for congressmen under the speech and debate clause of the Constitution. *Id.* at 235, 246. Both of those considerations arise directly from the Constitution and present a stronger case for a "special factor" than does the relationship between officers and enlisted men. Nonetheless, this Court held that those constitutional considerations insufficient to negate an implied right of action.

Moreover, in *Carlson* v. *Green*, 446 U.S. 14, 19 (1980), the Court suggested that even if the constitutional stature of the defendant was such that allowing a damage suit might inhibit his ability to perform his duties, that concern was more properly addressed by a grant of qualified immunity rather than denying the existence of a cause of action.

III.

Petitioners Are Entitled To Qualified Immunity Only.

As we have noted, (see page 5, *supra*) the court of appeals held as a threshold matter that respondents did have a cause of action directly under the fifth amendment. Most of the court's discussion, however, focused on the question whether the petitioners were entitled to an absolute or qualified immunity. The court of appeals considered this Court's decision in *Butz* v. *Economou*, 438 U.S. 478 (1978), and other cases recognizing that a qualified immunity was

appropriate for both state and federal officials charged with violating constitutional and civil rights. (Pet. App. 12a.) The court of appeals also considered two previous decisions of this Court, *Feres* v. *United States*, 340 U.S. 135 (1950), and *Dinsman* v. *Wilkes*, 53 U.S. (12 How.) 390 (1852), which considered claims arising out of military service, and found that neither decision precluded the granting of money damages in circumstances such as those presented here. (Pet. App. 13a.) Finally, the Court considered whether the military context in which these claims arose presented such special circumstances as to warrant absolute immunity, and held that they did not. (Pet. App. 14a-15a.) Noting that absolute immunity from suit would leave "a range of unredressable wrongs bounded only by the limits of one's imagination," the court of appeals held that petitioners were entitled only to a qualified immunity. (Pet. App. 18a-19a.)

A. The Supreme Court Generally Has Recognized Only A Qualified Immunity To Government Officials And Has Extended Absolute Immunity Only In The Most Exceptional Situations.

Our system of government under law "rests on the assumption that all individuals, whatever their position in government, are subject to federal law." *Butz* v. *Economou*, 438 U.S. 478, 506 (1978). In recognition of that principle, this Court has consistently recognized only a qualified immunity for government officials, except in the most exceptional circumstances.

In *Butz*, this Court rejected the petitioners' contention that high level executive officers, including members of the president's cabinet, were entitled to absolute immunity from liability that otherwise might have been incurred in the discharge of their duties. *Id.* at 506-07. As in its other immunity decisions, this Court sought to balance the poten-

tially conflicting interests of individual and government officials. Although it was careful not to "unduly interfere" with the exercise of official responsibilities, *id.* at 507, this Court recognized that government officials, by virtue of their positions might abuse their power and abridge important constitutional rights, to the detriment both of individual citizens and of our fundamental institutions. "In situations of abuse, an action for damages against the official responsible can be an important means of vindicating constitutional guarantees." *Id.* at 506.

Both before and after its decision in *Butz*, this Court has rejected numerous claims of absolute immunity made by various government officials. *See, e.g., Harlow* v. *Fitzgerald*, ... U.S. ....., 102 S. Ct. 2727 (1982) (presidential aides); *Procunier* v. *Navarette*, 434 U.S. 555 (1978) (prison officials); *O'Connor* v. *Donaldson*, 422 U.S. 563 (1975) (state hospital administrator); *Wood* v. *Strickland*, 420 U.S. 308 (1975) (school administrators); *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974) (state governor). These decisions demonstrate that, in all but the most exceptional circumstances, legitimate governmental interests can be preserved when governmental officials charged with violations of constitutional and civil rights are granted a qualified immunity only.

In *Butz*, this Court recognized that absolute immunity for violations of civil rights might be necessary in those few "exceptional situations" in which the defendant had demonstrated that it was necessary for the "conduct of the public business." *Id.* at 507. One such exceptional situation presented itself in *Nixon* v. *Fitzgerald*, ... U.S. ....., 102 S. Ct. 2690 (1982). The Court there granted absolute immunity from liability to the President of the United States, but emphasized the exceptional and "unique" constitutional position of the President as head of the execu-

tive branch. *Id.* at 2702. The companion case of *Harlow* v. *Fitzgerald*, ... U.S. ....., 102 S. Ct. 2727 (1982), however, demonstrated the narrow scope of such "exceptional situations." In *Harlow*, the Court declined to extend the President's absolute immunity to his closest aides and instead held that the aides were entitled to only a qualified immunity.

A military officer can hardly claim the same unique constitutional position as the President of the United States. Moreover, the daily life of service personnel in peace time does not qualify as an exceptional situation. Petitioners are unable to offer any evidence that the myriad mundane tasks performed daily by most enlisted personnel would be disrupted if damage actions for constitutional violations were allowed.

This Court also has held that absolute immunity is necessary for the conduct of the public business by prosecutors and judges. *Imbler* v. *Pachtman*, 424 U.S. 409 (1976) (prosecutors); *Pierson* v. *Ray*, 386 U.S. 547 (1967) (judges).[4] This country's adversarial system of justice provides significant protection against arbitrary, unlawful, or abusive conduct by prosecutors and judges. These protections include the existence of an independent and impartial judiciary to curb abusive practices by prosecutors; the professional obligations imposed upon both judges and prosecutors; the right to cross-examine witnesses; and the availability of appellate review. *See Butz* v. *Economou*, 438 U.S. 478, 512-14 (1978).

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[4] Other recent decisions in which defendants were granted absolute immunity were not based upon official immunity, but upon the legislative immunity of the speech and debate clause of the Constitution. *See, e.g., Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U.S. 391, 402-06 (1979); *Gravel* v. *United States*, 408 U.S. 606, 613-22 (1972).

The court of appeals examined the policy considerations justifying absolute immunity for prosecutors and judges, but found them lacking in the military setting. (Pet. App. 12a.) The military command structure discourages open dialogue or policies that would otherwise facilitate the alleviation of abuses. Military decisions are generally not reviewable in adversarial proceedings, and the internal grievance procedures which exist are of limited efficacy. (*See* page 8, note 3, *supra.*)

B. Prior Case Law Has Established That Military Officers Are Subject To Damage Suits For Their Intentional Acts.

This Court has already considered the propriety of a damage action against a military officer for an intentional tort in *Wilkes* v. *Dinsman*, 48 U.S. (7 How.) 89 (1849), and in *Dinsman* v. *Wilkes*, 53 U.S. (12 How.) 390 (1852). In both opinions, this Court rejected the defendant's alleged need and entitlement to absolute immunity from suit.

In *Dinsman*, a seaman sued the captain of a United States Navy vessel for assault, battery, and false imprisonment. The seaman claimed that his enlistment had expired during a prolonged voyage and that he was entitled to be discharged. He refused to obey further orders, whereupon the captain arrested and confined him until the ship returned to port.

In reversing a verdict entered in the captain's favor, and remanding for a new trial, the Court made clear that a serviceman is not absolutely immune from suit by a fellow serviceman for a willful tort. While recognizing the problems that civil damage suits could cause, the Court also recognized the unfairness of absolute immunity:

> [T]he nation would be equally dishonored, if it permitted the humblest individual in its service to be oppressed and injured by his commanding officer, from malice or illwill, or the wantonness of power, without giving him redress in the courts of justice.

Dinsman v. *Wilkes*, 53 U.S. at 403.

The decision of the court of appeals is consistent with this Court's holding in *Dinsman* that the captain was subject to liability for "willful torts." If military officers are granted a qualified immunity, only intentional or willful acts of discrimination could subject them to liability.

Despite the fact that the FTCA does not apply to violations of constitutional rights,[5] petitioners seek to rely on *Feres* v. *United States*, 340 U.S. 135 (1950), a suit interpreting the FTCA, to support their argument that they are entitled to absolute immunity for violating the respondents' constitutional rights. Pet. Br. at 16-17. *Feres* was a consolidated appeal of three cases in which the plaintiffs sought recovery from the government on behalf of servicemen injured by the negligence of military officers. This Court was required in *Feres* only to construe the statutory provisions of the FTCA to determine whether the federal government was liable for the negligence of a military officer. The *Feres* decision did not examine the issue of official immunity, nor did it examine the scope of immunity for intentional violations of constitutional rights.[6]

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[5] *See United States* v. *Muniz*, 374 U.S. 150 (1963) (prisoners' suit for constitutional violations not precluded by FTCA).

[6] The policy reasons underlying *Feres* do not apply in the pending controversy. As the court of appeals noted below, *Feres*

(footnote continued)

Feres, moreover, carefully distinguished an action for negligence from an action for an intentional tort: "We know of no American law which ever has permitted a soldier to recover for *negligence*, against either his superior officers or the Government he is serving." 340 U.S. at 141 (emphasis added). The Court, however, next cited *Dinsman* and *Weaver* v. *Ward*, Hobart 135, 80 Eng. Rep. 284 (1616), distinguishing the law relating to intentional torts from negligence actions. *Weaver* also permitted an intramilitary action for an intentional tort, assault and battery, by allowing the plaintiff to sue a fellow soldier who had shot him on a skirmish drill.[7]

This Court's prior cases, from *Dinsman* in 1849, to *Harlow* v. *Fitzgerald* in 1982, uniformly support respondents

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(footnote continued)

was a negligence action brought under the FTCA. Because the applicable law varied with the place of the tort, the government would be subjected to widely varying standards. In an action based on violations of the Constitution, however, the same federal law will always apply. *Feres* also found no parallel private liability, as required by the FTCA, and thus held that no recovery could be held against the government. The court of appeals correctly concluded, however, that this reasoning was "entirely inapplicable" to constitutional claims. Finally, the *Feres* Court found that alternative means of compensation were available to the plaintiff, whereas none are available to respondents in this matter. (Pet. App. 15a n.9.)

[7] Indeed, the accuracy of the historical support cited in *Feres* for recognizing absolute immunity against negligence actions has been seriously questioned. A historical analysis of prior cases reveals that even intramilitary negligence actions were proper. *See Jaffee* v. *United States*, 663 F.2d 1226, 1257 n.22 (3d Cir. 1981) (en banc) (Gibbons, J., dissenting), *cert. denied*, 456 U.S. 972 (1982) (citing W. Winthrop, *Military Law and Precedents* 885 (2d ed. 1920)); Zilman, *Intramilitary Tort Law: Incidence to Service Meets Constitutional Tort*, 60 N.C.L. Rev. 490, 492-502 (1982).

position that they cannot, except in the most extraordinary and limited circumstances, shield themselves from liability. Military and governmental officers must be held liable in damages for wilfull violations of the constitutional and civil rights of their subordinates.

IV.

A Qualified Immunity For Military Officers Strikes A Fair Balance Between The Competing Interests Of The Effective Conduct Of The Military And The Need To Provide Effective Redress For Violations Of Constitutional Rights.

The judgment below allows the interposition of absolute immunity in claims of common law torts, but allows only a qualified immunity in cases of constitutional violations, in all but the most exceptional circumstances. This result strikes a fair balance between the legitimate interests of the military and the competing interest of military servicemen, who are entitled to effective redress for violations of their constitutional rights.

The only compensatory relief reasonably available to respondents is through an action for damages. The decisions examining the propriety of damage actions and the proper scope of immunity require the courts to balance competing interests. *See Nixon* v. *Fitzgerald*, ... U.S. ....., 102 S. Ct. 2690, 2705-06 (1982); *Butz* v. *Economou*, 438 U.S. 478, 506-07 (1978). When other means of redress are not available, the balance of factors will ordinarily favor the granting of only qualified immunity. When some other form of relief is available, however, absolute immunity from suit may reflect the proper balance. *See United States* v. *Muniz*, 374 U.S. 150, 160 (1963); *Feres* v. *States*, 340 U.S. 135, 140 (1950). In the instant case, respondents have allegedly suffered the degradation of racial discrimination and the denial of ordinary opportuni-

ties for advancement and training in the armed forces because of discrimination on the part of officers whom their government has appointed to supervise them during the periods of their military service. Because no alternative compensation scheme is available, dismissal of the pending action would force these respondents to bear the entire weight of their losses with no opportunity to vindicate their rights.

A. The Elimination of Racial Discrimination Is A Paramount National Concern.

To balance fairly the competing interests in this lawsuit, respondents' allegations must be examined in their proper perspective. These allegations are not merely "petty" complaints, as petitioners would characterize them. Pet. Br. at 24. They are serious claims of racial discrimination that must not be taken less seriously merely because respondents happen to be enlisted men rather than, for example, civilian employees of the Department of Defense.

Since 1948, when President Truman ordered the desegregation of the armed forces, Exec. Order No. 9981 (July 26, 1948), the federal government has given substance, in numerous ways, to the principle that this nation is committed by fundamental law to the removal of racial discrimination from our national life. Numerous executive orders, acts of Congress and judicial decisions evidence that fact.

For instance, this Court has recognized that individual claims of discrimination not only benefit the plaintiff but also "vindicate the public interest in preventing . . . [future] discrimination." *General Telephone Co.* v. *EEOC*, 446 U.S. 318, 326 (1980). Likewise, this Court has noted that " 'not merely the power but the duty to render a de-

cree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.' " *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 (1975) (employment discrimination), *quoting*, *Louisiana* v. *United States*, 380 U.S. 145, 154 (1965) (voting rights).

Indeed, it is ironic that the government should seek in this case to blunt the most proven and effective weapon against racial discrimination in that very area of national life that was chosen by President Truman to press the fight against discrimination some 35 years ago. In previous cases, this Court has reviewed laws regulating military personnel policies to determine whether they impermissibly discriminated on the basis of sex. *See Schlesinger* v. *Ballard*, 419 U.S. 498 (1975); *Frontiero* v. *Richardson*, 411 U.S. 677 (1973). This Court must not hesitate to do the same in cases where damages are sought for racial discrimination. Notwithstanding official efforts to alleviate racial discrimination in the armed forces, the problem persists.[8] The official policy prohibiting racial discrimination can be accomplished most effectively through the threat of personal liability for the violation of a serviceman's constitutional rights.

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[8] In a recently published study on equal opportunity in the United States Army, minorities were found to be grossly underrepresented in the commissioned and noncommissioned officer ranks and to have received fewer promotions and a disproportioate number of punitive and administrative discharges and punitive confinements. *See generally* Office of the Deputy Chief of Staff for Personnel, Department of the Army, *Equal Opportunity: Fourth Annual Assessment of Military Programs* (May 1980) (hereinafter "Equal Opportunity Report").

B. Petitioners' Contention That Damage Suits Will Impede Military Effectiveness Is Unsupported And Unfounded.

Petitioners contend that the armed forces constitutes a "specialized community," apart from the civilian society, requiring a different set of rules to govern its conduct. The military, however, is no longer an insulated, specialized community. The modern military employs large numbers of civilians,[9] and is by no means limited to fighting men. Civilian and military personnel perform substantially the same work in a wide variety of fields. Indeed, many functions performed by military personnel, whether it be as engineer, physician, lawyer, musician, or cook, are similar, if not identical, to the functions performed in the private sector or other governmental areas.[10] The military is well integrated with the civilian society around it, and most military personnel now permanently reside offbase.[11] Thus, a large portion of military personnel function in roles virtually indistinguishable from those occupied by their civilian counterparts and live in the same society as do civilians. Yet they lack the same basic protections

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[9] In March, 1982, the United States Navy had 543,703 personnel on active duty and directly employed another 329,375 civilians. Directorate for Information Operations and Reports, Department of Defense, *Military Manpower Statistics* (Washington, D.C. 1982), and *Civilian Manpower Statistics* (Washington, D.C. 1982).

[10] *See, e.g.*, 10 U.S.C. §§ 4024 (accountants); 5578a (lawyers); 5579 (optometrists and pharmacists); 5707(d) (engineers); 6221 & 6222 (Navy and Marine Bands) (1976).

[11] *See* Comptroller General, *Report to the Congress: Lower Graded Military Personnel With Families Are Not Suitably Housed But Should Be*, at vi (Washington, D.C. 1979) (in a survey of available housing at six bases, the report found that of the 111,424 personnel counted, 90,600 resided off-base).

from official discrimination guaranteed to all by the Constitution.

Moreover, the expansive growth of modern military establishment has had far-reaching effects on our national life. Today, approximately four and one-half million men and women serve in the armed forces on either active reserve, or guard status.[12] This nation can ill afford to exclude such a large portion of its population from the fundamental protections of the Constitution.

Petitioners also contend that civilian courts lack the understanding and experience necessary for reviewing actions taken within the specialized military community. Pet. Br. at 26-28. But in the modern military, the civilian and military roles are no longer readily distinguishable, and civilian experiences easily carry over to the military setting. Moreover, the size and pervasiveness of the modern military makes it the rare individual either who has not personally served in the military or whose close family members have not served. Most important, however, is the undisputed fact that courts regularly analyze claims of discrimination in employment areas which require them to evaluate defenses based upon highly technical and unfamiliar evidence. *See, e.g., Hochstadt* v. *Worcester Foundation for Experimental Biology*, 545 F.2d 222 (1st Cir. 1976) (examining the qualifications of a biomedical researcher in an employment discrimination claim).

Because of the specialized nature of the military, petitioners argue that the discipline necessary to maintain

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[12] As of March 31, 1982, 2,107,028 were on active duty, and 2,334,510 were on reserve or guard status. *Military Manpower Statistics, supra,* at 3.

military effectiveness would be seriously disrupted if any damage actions were allowed to proceed. Pet. Br. at 20-26. Petitioners, however, can cite no evidence to support their contention that damage suits would undermine either military discipline or effectiveness. In the somewhat analogous situation of prison officials, the courts have rejected the need for wholesale immunity. For years, prison administrators argued that prison discipline would be destroyed if they were granted anything short of absolute immunity from damage suits brought by prisoners. But when this Court directly addressed the issue, it held that federal prison officials required only a qualified immunity. *United States* v. *Muniz*, 374 U.S. 150, 165 (1963). In *Muniz*, as in the case at bar, the defendants were unable to produce any evidence that prisoners' litigation would damage prison discipline. *Id.* at 163.

In the nineteen years since *Muniz*, the nation's prisons have continued to operate effectively. More important, the imposition of qualified immunity can be credited for prompting recalcitrant prison officials to correct many serious violations of prisoners' civil rights.[13] Ironically, under petitioners' view of the law, convicted criminals who have harmed society are entitled to vindicate violations of their constitutional rights, while individuals who voluntarily serve their country in the armed forces would be denied the same protection.

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[13] *See generally*, Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 Harv. L. Rev. 610, 639 (1979) ("Nearly everyone we interviewed believed that the cases have had great impact. Many pointed out that even losing cases have resulted in reform.").

Military discipline will not be crippled if officers are not absolutely shielded from liability when their actions violate the constitutional rights of others. Providing aggrieved servicemen with an opportunity to obtain financial redress for violations of their constitutional rights would provide an incentive to the military and its personnel to observe more carefully those constitutional rights. The result would help raise the military's public image, and would also end the adverse publicity created by abuses of military authority, which can only impair recruitment and ultimately impede efforts to maintain our effective, all-volunteer armed forces.

Minority group members comprise a disproportionate number of the enlisted personnel relative to commissioned officers. *Equal Opportunity Report, supra,* App. 1. Our military effectiveness relies on these men and women. The greater the perception of unredressed racial discrimination in the armed services, the less dedicated to our national defense they will be. *See generally* Note, *Intramilitary Immunity and Constitutional Torts,* 80 Mich. L. Rev. 312, 330-31 (1981).

Courts already review certain aspects of the modern military without adverse effects on military discipline, morale, or effectiveness. *See, e.g., Frontiero* v. *Richardson,* 411 U.S. 677 (1973) (plurality opinion) (voiding regulation providing servicewomen with lesser allowances than provided servicemen); *Bell* v. *United States,* 366 U.S. 393 (1961) (reversal of army's refusal to pay former soldiers who, while prisoners during the Korean War, had betrayed fellow prisoners); *Harmon* v. *Brucker,* 355 U.S. 579 (1958) (statutory authority exceeded in draftee's less than honorable discharge). Of course, suits that are brought by servicemen against their superiors for injunc-

tive relief necessarily raise the spectre of a contempt citation in the event of non-compliance. Surely, that possibility is no less disruptive of discipline than would be a suit for damages.

Petitioners also argue that if damage actions are allowed for violations of constitutional rights, as well as those based on common law torts, military officers will be unfairly subjected to all manner of frivolous suits which will further disrupt military discipline. Pet. Br. at 24. However, the fear that any common law tort can be pleaded as a constitutional violation cannot withstand scrutiny. The court of appeals considered this issue and noted that firm application of the summary judgment procedure would dispose of such lawsuits at an early stage. (Pet. App. 17a.) This Court too has twice addressed and rejected this contention:

> "Insubstantial lawsuits can be quickly terminated by federal courts alert to artful pleading. . . . [F]irm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits."

Harlow v. *Fitzgerald*, ... U.S. ....., 102 S. Ct. 2727, 2733 (1982), *quoting*, *Butz* v. *Economou*, 438 U.S. 478, 507-08 (1978).[14]

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[14] This Court has readily distinguished between legitimate allegations of violations of constitutional rights and common law torts camouflaged as constitutional claims. *See Estelle* v. *Gamble*, 429 U.S. 97, 106-07 (1976) (prisoner's claim for damages against prison officials and his treating physicians was really a tort claim for medical malpractice cognizable under state law, rather than a violation of constitutional rights); *Baker* v. *McCollan*, 443 U.S. 137, 146 (1979) (mistaken arrest and imprisonment based upon probable cause did not constitute a violation of constitutional rights, even though it might state a claim in tort).

Moreover, the recently enacted Equal Access to Justice Act ("EAJA"), P.L. 96-481, 94 Stat. 2328, § 204(b) (1982) (codified at 28 U.S.C. § 2412 (b)), would appear to allow the United States, upon prevailing in a civil rights action, to recover attorney fees from the plaintiff.[15] Thus, when frivolous claims are brought, the defendants may well shift the cost of their defense to the plaintiffs. This threat of possibly significant financial costs should discourage frivolous claims.

Despite petitioners' attempt to characterize allegations of the case at bar as "petty" complaints (Pet. Br. at 24), respondents' claims are cognizable only under the constitutional. No common law tort exists for denial of the equal protection of the laws. If a plaintiff can convince the court that the challenged conduct amounts to a true constitutional deprivation, he should be allowed to proceed.

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[15] Under the Civil Rights Attorney Fees Award Act, 42 U.S.C. § 1988, a court in its discretion may award fees to the prevailing party. Although this section specifically excludes the award where the United States is the prevailing party, the EAJA appears to remove this exception and places the federal government on par with other parties whether the suit is brought under 42 U.S.C. § 1985(3) or as a *Bivens* action. *See Lauritzen* v. *Secretary of Navy*, 546 F. Supp. 1221, 1227-29 (C.D. Cal. 1982) (plaintiff recovered fees from federal government under EAJA in *Bivens* action). *But see United States* v. *Miscellaneous Pornographic Magazines*, 541 F. Supp. 122, 129 (N.D. Ill. 1982) (no recovery of fees in *Bivens* actions; but, in dictum, recovery from federal government under EAJA in a section 1985 action).

Given the serious nature of petitioners' alleged acts, a grant of qualified immunity fairly balances both the parties' competing interests and the public interest. A complete bar in damage actions would allow military officers to discharge their duties without regard to their subordinates' fundamental civil rights.[16] Because the defendants have not demonstrated the presence of the "exceptional circumstance" compelling a need for absolute immunity, they are properly entitled to a qualified immunity only.

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[16] Several courts which have felt compelled to adopt the rationale of the *Feres* decision and grant absolute immunity have expressed dismay. *See, e.g., Labash* v. *United States Department of Army*, 668 F.2d 1153, 1156 (10th Cir.), *cert. denied*, 102 S. Ct. 2299 (1982) ("we are constrained to follow the *Feres* doctrine, notwithstanding its harsh result"); *Jaffee* v. *United States*, 468 F. Supp. 632, 633-34, 635 (D.N.J. 1979), *aff'd*, 663 F.2d 1226 (3d Cir. 1981) (en banc), *cert. denied*, 456 U.S. 972 (1982) ("with the greatest reluctance," the court was "forced to agree" that *Feres* prevented the plaintiff's recovery; it was "unfortunate" that *Feres'* immunity could not be limited to decisions made in the heat of battle); *Schmid* v. *Rumsfeld*, 481 F. Supp. 19, 25 (N.D. Cal. 1979) (the court "deplore[d] the lack of judgment shown by plaintiff's superiors"); *Thornwell* v. *United States*, 471 F. Supp 344, 348 n.1 (D.D.C. 1979) ("*Feres* appears to grant an immunity which is broader than necessary," which might "lead to unconscionable results.").

CONCLUSION

For the foregoing reasons, the Lawyers' Committee For Civil Rights Under Law, as Amicus Curiae, respectfully submits that this Court should affirm the judgment below of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

BARRY SULLIVAN
Counsel of Record
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

Of Counsel:
JOAN M. HALL
GAIL A. NIEMANN
JEFFREY P. CHICOINE
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

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